Supreme Court, U.S.
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No.

# In the
# Supreme Court of the United States

**RNJ INTERSTATE CORPORATION,**

*Petitioner,*

v.

**UNITED STATES,**

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Federal Circuit erroneously held that a government contractor is prevented from recovering costs for its part performance of its contract with the Government where: (1) the Government's property on which the contractor was performing its work was entirely destroyed by fire through no fault of the contractor and (2) it, thus, became impossible for the contractor to ever complete its contract? The decision rendered by the U.S. Court of Appeals for the Federal Circuit herein conflicts with *United States v. Spearin*, 248 U.S. 132 (1918) and *Foster Wheeler Corporation v. United States*, 513 F.2d 588 (Ct. Cl. 1975).

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties that were involved in the proceeding before the U.S. Court of Appeals, Federal Circuit, are RNJ Interstate Corporation and the United States. There are no parent companies or non-wholly owned subsidiaries of RNJ Interstate Corporation.

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## PETITION FOR WRIT OF CERTIORARI

RNJ Interstate Corporation respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals, Federal Circuit, in this case.

## OPINIONS BELOW

The decision of the U.S. Court of Appeals, Federal Circuit (hereinafter "Federal Circuit"), is reported at 181 F.3d 1329 (Fed. Cir. 1999) and is reprinted in Appendix A. The judgment of the U.S. Court of Federal Claims (hereinafter "Court of Federal Claims") is unreported and is reprinted in Appendix B.

## JURISDICTION

The opinion of the Federal Circuit was entered on June 10, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

On May 29, 1991, the United States awarded Contract No. 91 C 2206 to RNJ Interstate Corporation (hereinafter "RNJ"). The contract provided that RNJ would perform certain renovations to Building No. 10 at the Naval Air Station in Glenview, Illinois, for a total contract amount of $3,368,400. Under the contract, RNJ was to repair the pre-existing structure, including refurbishing carpentry, doors, and windows; removing asbestos; and adding fire protection. The contract did not include repairs to the roof, to any of the exterior walls, or to the basic structure of the building.

In September 1991, RNJ undertook its work at the subject property. On March 13, 1992—with the renovations in the building approximately 70% complete—a fire totally destroyed the structure. At the time of the fire RNJ was owed $1,173,322 for work which it had completed, but for which the United States had not yet compensated it.

On or about July 22, 1993, RNJ submitted a claim for $1,173,322 to the Contracting Officer for the uncompensated work it had completed prior to the fire. The contracting officer denied RNJ's claim in its entirety, and RNJ then filed an action in the Court of Federal Claims. Jurisdiction in that court was based upon 28 U.S.C. § 1491(a)(1) and (2), which provides that the Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon an express contract a party has with the United States. The United States filed a counterclaim for $10,689,542 for the damage caused by the destruction of the building, the costs of cleanup, the replacement of the building, and the repayment of any progress payments already paid. The parties settled the counterclaim, agreeing that RNJ was not at fault for the fire and that the potential fault of the parties would not be an issue in the case. The only claim that remained in the Court of Federal Claims was RNJ's claim for $1,173,322 for the work that RNJ had completed, but had not been paid for, prior to the fire.

RNJ thereafter moved for summary judgment, arguing that the destruction of the Naval Building by fire rendered performance of the contract impossible and that RNJ was entitled to recover for its part performance (*i.e.*, the value of the work it had performed up

until the time of the fire). The Court of Federal Claims nonetheless granted a cross-motion for summary judgment filed by the United States and denied the summary judgment motion filed by RNJ. On June 10, 1999, the Federal Circuit issued a published decision affirming the judgment rendered by the Court of Federal Claims. RNJ now petitions this Court for a writ of certiorari to review the opinion and judgment of the Federal Circuit.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT CONFLICTS WITH *UNITED STATES v. SPEARIN* AND *FOSTER WHEELER CORPORATION v. UNITED STATES.*

A principal consideration governing the exercise of this Court's certiorari jurisdiction is whether a U.S. Court of Appeals has entered a decision that conflicts with a decision of another U.S. Court of Appeals or conflicts with a relevant decision of this Court. S. Ct. Rule 10(a), (c). In this case, the decision issued by the Federal Circuit plainly conflicts with the following decisions: *United States v. Spearin*, 248 U.S. 132 (1918) and *Foster Wheeler Corporation v. United States*, 513 F.2d 588 (Ct. Cl. 1975).

RNJ is seeking solely to be compensated for the unpaid portion of the renovation work that it duly performed within the Government's building prior to the complete destruction of that building by fire. The cases of *United States v. Spearin*, 248 U.S. 132 (1918) and *Foster Wheeler Corporation v. United States*, 513 F.2d 588 (Ct. Cl. 1975) dictate a judgment in favor of RNJ in

this case. In *Spearin* and *Foster*, contracts were entered into by private contractors and the Government. Ultimately, the contracts became impossible to perform, and the government contractors in those cases were allowed to recover the value of their part performance (*i.e.*, the labor and materials expended by the contractors prior to the contracts becoming impossible to perform).

*United States v. Spearin*, 248 U.S. 132 (1918) is particularly relevant herein. In that case, the contract to be performed by the government contractor was ultimately rendered impossible to perform because of faulty specifications given to the contractor by the Government. The contractor eventually filed suit, seeking to recover costs for the labor and materials it expended before the contract became impossible to perform. This Court held that the contractor was entitled to recover such costs, holding that the doctrine of impossibility applied and allowing the contractor to recover for its part performance.

In this case, the Federal Circuit acknowledged that the "[d]estruction of the situs of performance is a classic case for the application of the impossibility doctrine." *See* Appendix A at A-3. The Federal Circuit, however, held that the contract between the Government and RNJ specifically addressed which party would bear the risk of loss in the event of the total destruction of the subject of the contract—the Naval Building. The Federal Circuit determined that the contract placed the risk of loss on RNJ. *See* Appendix A at A-4, A-5.

Specifically, the Federal Circuit relied upon the "Permits and Responsibilities" provision contained in the

contract between RNJ and the Government. That provision, which is a standard provision that was incorporated into the contract from Federal Acquisition Regulation 52.236-7, provides as follows:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. *The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.* (emphasis added).

The Federal Circuit relied upon the third clause of the Permits and Responsibilities provision, emphasized above, in holding that the contract between RNJ and the Government did address risk of loss in the event that the Government's building was destroyed. *See* Appendix A at A-4, A-5.

Plainly, this clause has no applicability to the case at bar. Under the clause, if any portion of RNJ's renovation work (or materials used in the performance of such work) became damaged prior to the completion and acceptance by the Government of RNJ's entire renovation project, RNJ would be required under the contract to replace the damaged work or to make the necessary repairs. However, inasmuch as this clause contemplates the eventual "completion and acceptance of the entire work" by the Government, such clause can only be taken to address the risk of loss for repair work and costs arising during *the continued existence of the building*. That the contractor will ultimately complete

the work is a basic assumption of this clause and, thus, this clause cannot be applied to the situation at bar where RNJ can never go on to complete the contract.

Notably, there is absolutely no case authority for the Federal Circuit's strained interpretation of the foregoing clause. The Federal Circuit cites to one case as "authority" for its position: *Al Johnson Constr. Co. v. United States*, 854 F.2d 467 (Fed. Cir. 1988). However, that case is factually inapposite. In *Al Johnson*, a portion of a contractor's work in progress became damaged. The contractor repaired the work, at its own cost, *and then went on to complete the project.* Under the scenario presented by this case, however, RNJ cannot go on to complete the work because of the complete destruction of the Naval Building—the subject of the contract. Thus, the *Al Johnson* case in no way supports the Federal Circuit's opinion that the third clause of the Permits and Responsibilities provision addresses which party must bear the risk of loss in the event of the total destruction of the subject of the contract.

Of even more importance, this Court has rejected the very position taken by the Federal Circuit in this case. In *Spearin*, this Court specifically rejected an argument that a "general clause requiring the contractor . . . to assume responsibility for the work until completion and acceptance" could be used to defeat the contractor's claim for part performance after the contract becomes impossible to perform. *Spearin*, 248 U.S. at 137. This Court's holding in *Spearin* clearly establishes that a general clause, such as the one relied upon by the Federal Circuit herein, will not defeat a claim by a contractor for part performance under the circumstances of this case.

RNJ was entitled to judgment in this case on the authority of *Spearin* and *Foster*. It is simply erroneous and inequitable for the Federal Circuit to rely upon the third clause of the Permits and Responsibilities provision of the contract to skirt RNJ's proper entitlement to recovery herein. A careful look at this clause yields the obvious conclusion that the contract herein did not place the risk of loss upon RNJ for the damages suffered by RNJ herein. The Government, as drafter, could have provided in the contract how the parties would be left under the circumstances of this case. It did not. The contract is simply silent on this issue.

## II. THE ISSUE PRESENTED HEREIN IS IMPORTANT.

The erroneous decisions by the Court of Federal Claims and the Federal Circuit have had a devastating impact upon RNJ's financial viability. The decisions of the lower courts have deprived RNJ of over one million dollars in labor and materials that RNJ duly expended in a good faith effort to meet its obligations under the contract. At the Government's request, RNJ came onto the Government's premises and performed renovation work for the Government. RNJ did not obtain builder's risk insurance because it was merely performing renovation work in a building owned and controlled by another entity. The destruction of the building through no fault of RNJ and the denial of recovery to RNJ for uncompensated labor and materials has placed RNJ in financial distress. The plight of RNJ, illustrated by this case, certainly raises concern as to whether other private contractors will be reluctant to enter into contracts with the Government.

## CONCLUSION

For the foregoing reasons, RNJ Interstate Corporation respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals, Federal Circuit, in this case.

Respectfully submitted,

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# APPENDICES

# APPENDIX A

181 F.3d 1329
(Cite as: 181 F.3d 1329)

RNJ INTERSTATE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

No. 99-5007.

United States Court of Appeals,
Federal Circuit.

June 10, 1999.

* * * * *

Before MAYER, Chief Judge, RADER, and BRYSON, Circuit Judges.

BRYSON, Circuit Judge.

This government contract case concerns the destruction by fire of a building that the contractor was in the process of renovating. The government and the contractor stipulate that neither was at fault with respect to the fire. We agree with the trial court that the government is not liable to pay for the contractor's uncompensated work, and we therefore affirm the judgment in the government's favor.

I

In May 1991 RNJ Interstate Corporation entered into a contract with the Navy to renovate a building at the Naval Air Station in Glenview, Illinois. The renovation work required by the contract did not include repairing the exterior or basic structure of the building. The contract provided for the government to make progress payments to RNJ during the project's pendency. The contract also included a Permits and Responsibilities Clause incorporated from the Federal Acquisition Regulation, which stated:

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. *The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit or work which may have been accepted under the contract.* 48 C.F.R. § 52.236-7 (emphasis added).

RNJ began work in September 1991, and the government made progress payments *1331 to RNJ as the work progressed. RNJ had completed more than half of the project when the building was completely destroyed by fire on March 13, 1992. Both parties agree that the

government had not accepted any portion of RNJ's work at the time of the fire.

In July 1992 the contracting officer received a claim from RNJ for the value of its allegedly completed work minus the progress payments. The contracting officer denied RNJ's claim and asserted a counterclaim that RNJ was at fault for the fire and was required to reimburse the government for cleanup and replacement of the building. The parties brought their claims before the Court of Federal Claims.

During litigation before the trial court, the parties settled the government's counterclaim and stipulated that neither was at fault with respect to the fire. The parties then filed cross-motions for summary judgment on RNJ's claim. The trial court held that the last sentence of the Permits and Responsibilities Clause placed the risk of loss upon RNJ and therefore entered summary judgment in favor of the government.

## II

RNJ contends that the trial court misinterpreted the contract language and should have awarded it compensation because performance of the contract has become impossible. Destruction of the situs of performance by fire is a classic case for application of the impossibility doctrine. *See, e.g., Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B.1863). Both parties agree that the impossibility doctrine applies in this case; they disagree, however, about the consequences of applying that doctrine.

The government argues that the destruction of the building relieved RNJ of its obligation to complete the

renovation and the government of its obligation to make payments. RNJ agrees with the former but not the latter. It argues that when an event occurs during performance that renders complete performance impossible, the contractor is entitled to compensation for the work already done.

In making its argument, RNJ seeks support in what it characterizes as the common law doctrine of impossibility. In fact, however, the common law doctrine is a default and does not apply where the parties have agreed, by the terms of their contract, to a different allocation of risks. In this case, we conclude that the contract between RNJ and the government allocated the risk of loss to RNJ prior to the acceptance of the work, and that the contract therefore bars any recovery by RNJ in this case.

The last sentence of the Permits and Responsibilities Clause stated: "The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit or work which may have been accepted under the contract." That clause allocates all risks to the contractor until a specified event occurs. *See Al Johnson Constr. Co. v. United States*, 854 F.2d 467, 470 (Fed. Cir. 1988) ("[T]he General Provision 12—Permits and Responsibilities, places on the contractor a risk to materials and work performed until acceptance occurs."). Both parties agree that acceptance never occurred; the risks therefore had not shifted from the contractor to the government when the building was destroyed by fire.

RNJ argues that the reasonable interpretation of the last sentence of the Permits and Responsibilities Clause is that RNJ must replace or repair any work damaged prior to acceptance and that, because such replacement or repair is impossible here, that obligation is irrelevant to this case. We disagree. First, the clause uses the general language of responsibility and makes no mention of the specific obligations to which RNJ would limit it. Second, in *Al Johnson* this court interpreted the clause to place all risks on the contractor. *1332 RNJ's attempt to limit the risks that the clause imposes does not comport with our case law.

RNJ's second argument is that the Permits and Responsibilities Clause contemplates the eventual "completion and acceptance of the entire work." RNJ therefore argues that the clause cannot apply to damage that occurred during an event that made such completion and acceptance impossible. We disagree. The completion and acceptance of the entire work is merely a condition, the fulfillment of which shifts the risks from RNJ. While the clause may "contemplate" completion, that does not distinguish it from many other contract provisions. When completion does not occur, whether because of breach, agreement, or impossibility, the provisions of the contract are still valid. Because the condition set out in the Permits and Responsibilities Clause was not fulfilled prior to the destruction of RNJ's work, the entire risk was still allocated to RNJ. Because the contract clearly placed the work and materials within RNJ's responsibility, the government is not liable for their destruction.

AFFIRMED.

# APPENDIX B

IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

No. 95-232C

(Filed August 19, 1998)

* * * * * * * * * * * * * * * * * * * * * * * * *

RNJ INTERSTATE CORPORATION, *
*
Plaintiff, *
v. *
*
THE UNITED STATES, *
*
Defendant. *
*

* * * * * * * * * * * * * * * * * * * * * * * * *

*John W. Bell*, Chicago, Illinois, for plaintiff.

*Shalom Brilliant*, Washington, DC, with whom was *Assistant Attorney General Frank W. Hunger*, for defendant.

## OPINION AND ORDER

WEINSTEIN, Judge

This contract dispute, brought pursuant to 28 U.S.C. § 149(a)(1) and (2), is before the court on cross-motions for summary judgment. Plaintiff seeks damages for defendant's failure to make payments allegedly due for

work previously performed under a contract to renovate a pre-existing structure that was destroyed by fire before completion of the contract.

Plaintiff claims that it is entitled to payment for such work (for which it has never been compensated) because the contract does not allocate the risk of loss, and because, under these circumstances, the common law provides that the risk of loss remains with the property owner. Defendant maintains that plaintiff is not contractually entitled to payment because the work was never completed or accepted by defendant, and the risk of loss, by contract, remains with plaintiff until then. Argument is deemed unnecessary. The court denies plaintiff's motion and grants defendant's cross-motion.

*Facts*

The relevant facts are not in dispute. On or about May 29, 1991, the government awarded Contract No. 91 C 2206 (the contract) to RNJ Interstate Corporation (RNJ). It provided for RNJ to renovate Building No. 19 at the Naval Air Station in Glenview, Illinois (the building) for a total contract amount of $3,368.400.

Under the contract, RNJ was to repair the pre-existing structure, including refurbishing carpentry, doors, and windows; removing asbestos; and adding fire protection. The contract did not include repairs to the roof, to any of the exterior walls, or to the basic structure of the building. Plaintiff began work under the contract in September, 1991. On March 13, 1992, after plaintiff had completed approximately 70% of the renovations, a fire totally destroyed the building. Up until

then, defendant had paid plaintiff progress payments of $1,394,572.

On or about July 22, 1993, plaintiff submitted a claim for $1,173,322 to the Contracting Officer (CO), for the uncompensated work it had completed. The CO denied plaintiff's claim, in its entirety, on May 31, 1993, and asserted a counterclaim for $10,689,542 for the damage caused by the destruction of the building; the costs for cleanup and replacement of the building; and repayment of the progress payments already paid. Plaintiff filed its complaint in this court on March 14, 1995. On June 14, 1995, defendant filed its answer and a counterclaim for repayment of the progress payments and the costs of reconstructing the building. On January 30, 1998, the parties filed a stipulation of partial dismissal, with prejudice, of defendant's (settled) counterclaim and count II of plaintiff's complaint. Plaintiff and defendant concede that "the potential fault of the parties with respect to the fire is no longer at issue in this case." Plaintiff's Motion for Summary Judgment at 2; Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment at 6 n.4. Accordingly, the only claim remaining before the court is plaintiff's claim for $1,173,322, for the uncompensated work.

*Discussion*

Summary judgment is appropriate when the court finds both that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rules of the United States Court of Federal Claims (RCFC) 56(c); *Anderson*

*v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). There is a material issue of disputed fact when a reasonable finder of fact could return a verdict in favor of the nonmovant. *See Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987). The fact that both parties have requested summary judgment is not dispositive as to whether summary judgment is appropriate. *See Prineville Sawmill Co. v. United States*, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

This case requires contract interpretation, which is a matter of law amenable to decision by summary judgment. *See Government Sys. Advisors, Inc. v. United States*, 847 F.2d 811, 813 n.1 (Fed. Cir. 1988); *P.J. Maffe Bldg. Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984).

When interpreting a contract, the court looks first to the plain meaning of the contract. *See Aleman Food Servs., Inc. v. United States*, 994 F.2d 819, 822 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). The court must give reasonable meaning to all parts of the contract, and not render any portion meaningless. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *Thanet Corp. v. United States*, 591 F.2d 629, 633 (Ct. Cl. 1979).

Plaintiff argues that the contract does not allocate the risk of loss for property that was damaged through no fault of either party and, thus, that common law principles govern the case. Plaintiff maintains that, under such principles, destruction of the property subject to the contract excuses further performance and entitles

the contractor to the value of the work performed up until that point.

Defendant maintains that the contract allocates the risk of loss for such an event by incorporating FAR § 52.236-7 (Permits and Responsibilities clause), which states (emphasis added):

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. *The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.*

The third sentence of this contract clause clearly makes the contractor responsible (and makes it bear the risk of loss) for all "work performed until completion and acceptance of the *entire* work" unless defendant incrementally accepts portions of completed work. FAR § 52.236-7 (emphasis added). Though the defendant made progress payments to plaintiff, the parties agree that defendant did not accept any portion of the work plaintiff completed before the fire, even the work for which it had already been compensated.

Plaintiff's argument relies on the last two sentences of the incorporated Permits and Responsibilities clause, which, it claims, distinguish between the "property" (*i.e.*, the building) and the "work performed" (*i.e.*, the renovations). Plaintiff maintains that the contract qualifies "property" as that destroyed by plaintiff's fault or negligence, and fails to allocate the risk of loss for the property destroyed (as here, admittedly) through no fault or negligence of plaintiff. Therefore, plaintiff argues, defendant bears the risk of loss for the property other than that caused by plaintiff's negligence.

The second sentence of FAR § 52.236-7 provides that plaintiff bears the risk of loss for the entire property if its destruction was due to plaintiff's fault or negligence. The third sentence places the risk of loss of the building not due to negligence on defendant where defendant has accepted the work. The risk of loss for any materials delivered or work performed up until defendant accepted the materials or work performed resides with plaintiff. Because it is undisputed for these purposes that plaintiff was not negligent and that defendant never accepted the portion of the renovations completed when the fire destroyed the building, plaintiff continues to bear the risk of loss for the work it performed under the contract up until the fire.

Plaintiff demands compensation only for its renovations to the property, or "work performed," not compensation for the property itself. (Defendant is not here seeking to recover the cost of rebuilding the property, or, for that matter, the amounts already paid.) The risk of loss for "work performed" under the contract, therefore, under the third sentence of the Permits and Responsibilities clause, clearly falls on the contractor.

The cases relied upon by plaintiff are inapposite. First, most were decided under common law (specifically, under state law). They also do not involve federal common law or a contractual provision similar to the one at bar. Plaintiff's reliance on the only relevant and binding precedents it cites, *United States v. Spearin*, 248 U.S. 132 (1918) and *Foster Wheeler Corp. v. United States*, 513 F.2d 588 (Ct. Cl. 1975), also is misplaced, as both cases concerned the impossibility of performing a contract due to defective government specifications, for which the government clearly is liable.

In *Spearin*, the Supreme Court held that the government breached a warranty that its specifications were adequate for plaintiff to perform the contract. No breach of warranty is alleged here. In *Foster Wheeler*, the Court of Claims held that a fixed-price supply contract for marine equipment and related written materials was impossible to perform and that the government bore the risk of impossibility. *Id.* at 602. The court concluded that the government assumed the risk because: the government drew up detailed performance specifications; the contractor did not have expertise superior to the government's (and thus the government bore the risk of impossibility); and there was no mutual mistake of fact between the parties. Most importantly, the contract in *Foster Wheeler*, unlike this one, did not contain a Permits and Responsibilities clause, or otherwise expressly allocate the risk in the contract.

The doctrine of impossibility, upon which plaintiff also relies, is inapplicable in these circumstances. The doctrine represents "the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having con-

tracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance." *Natus Corp. v. United States*, 371 F.2d 450, 456 (Ct. Cl. 1967) (quoting *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966)). This equitable doctrine might justify plaintiff's non-performance of its unsatisfied contractual obligations, but does not warrant compensation for work already performed under the contract. Further, if plaintiff's contractual obligations to perform are to be excused for impossibility, defendant's unperformed duties (to accept the completed renovations or to incur a liability to pay for them) also should be discharged.

Moreover, before invoking the doctrine of impossibility, a court must determine that the parties have neither contractually allocated the risk of impossibility of performance nor otherwise provided for the consequences of any contingency rendering contract performance impossible. *See J.A. Maurer, Inc. v. United States*, 485 F.2d 588, 595 (Ct. Cl. 1973). Here, the parties explicitly allocated the plaintiff the risk for all work performed until "completion and acceptance of the entire work" by defendant. FAR § 52.236-7.

Plaintiff concedes that, had it constructed the entire building, it would continue to be liable under the contract and would have been required to redo the work. Plaintiff's Motion for Summary Judgment at 4. It points out that this was impossible here. However, plaintiff does not address the logical practical implication of its concession—if it completed construction prior to acceptance, it would have been forced to incur, uncompensated, *double* the costs, whereas with partial performance, as here, it will have to pay only once, and

only for the work already performed (assuming acceptance). Again, plaintiff's argument that it should be paid for prior unaccepted work because it could not perform the entire contract also ignores the second part of the third sentence of FAR § 52.236-7, which, by providing for payment only upon completed (and accepted) partial performance, necessarily excludes payment when the performance, as here, is incomplete (and unaccepted).

Cases decided in this circuit under the Permits and Responsibilities clause make clear that contractors are obligated to repair any damage, whether or not it was due to contractor's negligence, unless it was caused by the government. *See e.g.*, *Edward R. Marden Corp. v. United States*, 442 F.2d 364, 368 (Ct. Cl. 1971) ("The Permits and Responsibilities [clause] essentially places the responsibility for all . . . work performed on the contractor until such time as the project is completed and accepted by the Government. As between the contracting parties, the crucial function of the [clause] is allocation of risk. There is nowhere in the [clause] a provision for a contract adjustment in the event that work or materials are damaged or destroyed."); *John McShain, Inc. v. United States*, 375 F.2d 829 (Ct. Cl. 1967); *Aleutian Constructors v. United States*, 24 Cl. Ct. 372 (1991); *Joseph Becks & Assocs., Inc.*, ASBCA No. 31, 126, 88-1 BCA ¶ 20,428, *aff'd*, 864 F.2d 150 (Fed. Cir. 1988).

*Conclusion*

For the foregoing reasons, the court concludes that in incorporating FAR § 52.236-7 the contract allocates the risk of loss to plaintiff for the work performed, but not

accepted, prior to the building's destruction by fire. *See Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965) (language of contract is given its ordinary and commonly accepted meaning unless it is shown that the parties intended otherwise).

Accordingly, plaintiff's motion for summary judgment is denied and defendant's cross-motion is granted. The clerk is directed to enter judgment in favor of defendant. No costs.

DIANE GILBERT WEINSTEIN
Judge, U.S. Court of Federal Claims

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IN THE
UNITED STATES COURT OF FEDERAL CLAIMS

No. 95-232 C

(Filed August 19, 1998)

RNJ INTERSTATE CORPORATION,

v. JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed August 19, 1998, denying plaintiff's motion for summary judgment, and granting defendant's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. No costs.

Margaret M. Earnest
Acting Clerk of Court

August 19, 1998 By:

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of all plaintiffs. Filing Fee is $105.00.